United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7422

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

REGINALD V. SCHMIDT,

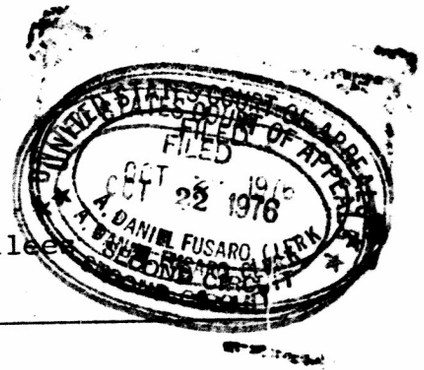
Plaintiff-Appellant,

P/S

vs.

RAYMOND T. McKAY and JOHN F. BRADY, representatives of a class of persons who were members of District 2 - Marine Engineers Beneficial Association - AFL-CIO in September 1971,

Defendants-Appellees.



ON APPEAL FROM THE

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-7422

REGINALD V. SCHMIDT,

Plaintiff-Appellant,

-against-

RAYMOND T. McKAY and JOHN F. BRADY, as representatives of a class of persons who were members of District 2 - Marine Engineers Beneficial Association - AFL-CIO in September 1971,

Defendants-Appellees

On Appeal from United States District Court

For the Eastern District of New York

BRIEF OF PLAINTIFF-APPELLANT REGINALD V. SCHMIDT

This is an appeal from a decision of the Hon. Walter Bruchhausen dismissing the second amended complaint in the above entitled action on the ground that the action was commenced eleven days after expiration of the six year statute of limitations.

The Issues Presented for Review

1. Where plaintiff organized and led a picket line in 1966, in support of a union organizing drive, in reliance upon an explicit promise of the defendant leaders of the union that in consideration for such support plaintiff would be assured past service credits for his account for a pension, and defendants thereafter took no steps to comply with their promise, did the District Court err in concluding that the statute of limitations commenced to run on November 16, 1966, the final day of picketing, notwithstanding the fact that plaintiff was not required, and did not seek, to retire until 1971?

2. Did the District Court err in failing to find that the reasonable time for performance by defendants of their promise to plaintiff was no sooner than at or shortly before such time as plaintiff actually sought to retire?

3. Did the District Court err in failing to find that the reasonable time for performance by defendants of their promise to plaintiff was in any event no earlier than several months or years following November 16, 1966?

4. Did the District Court err in failing to find that, if defendants had breached their contract with plaintiff on November 16, 1966, by failing to immediately seek to carry out their promise, such breach was anticipatory only, entitling plaintiff to wait before bringing an action until he suffered actual damage by the denial of his application for pension benefits in 1971?

5. Where plaintiff wrote to defendant Brady in September 1967, asserting his belief that defendants would comply with their agreement with him, and Brady failed to reply to the letter, did the District Court err in failing to find that defendants are equitably estopped from asserting that the statute of limitations commenced to run at any time prior to 1971 when plaintiff discovered the breach of contract and fraud?

6. Did the District Court err in finding that plaintiff had an immediate obligation on November 16, 1966 to seek a certification of his pension benefits, when in fact and in law plaintiff was entitled to rely upon the representations made to him by the duly elected defendant officers of the union that they would assure his being credited with past service benefits for his account for a pension?

7. Did the District Court err in concluding that plaintiff could have discovered defendants' fraudulent intention not to carry out their promise with reasonable diligence commencing November 16, 1966, when in fact and in law plaintiff reasonably relied on defendants' original promise as well as upon Brady's silence upon his receipt in 1967 of plaintiff's letter asserting his belief in defendants' good faith?

Statement Of The Case

1. Nature of the Case

The second amended complaint sets forth causes of action in contract, promissory estoppel and fraud. The defendants Raymond T. McKay and John F. Brady, President and Secretary-Treasurer respectively of District 2 Marine Engineers Beneficial Association, AFL-CIO ("MEBA"), are sued in their representative capacity as representatives of the class of persons who were members of MEBA in September, 1971. From 1946 to 1972, with the exception of a five-month period in 1947-48, plaintiff was a member in good standing of MEBA. From 1946 until 1966 plaintiff was employed by the Cities Service Tanker Corporation ("Cities Service"), a company having no collective bargaining agreement with MEBA. In 1966 plaintiff was induced by the defendants McKay and Brady to organize and lead picketing that took place in Mobile, Alabama from October 26, 1966 until November 16, 1966, aimed at supporting MEBA's efforts to organize Cities Service. The inducement consisted of an explicit promise made in writing by the defendants that

whether or not the strike action was successful, the defendant would (a) arrange with the trustees of the MEBA Pension Plan to include all the past service credits of plaintiff, or (b) if such arrangement should not be accomplished, that MEBA would make the appropriate contributions, with the result that the past service credits of plaintiff would be totally accredited to his account for a pension from the MEBA Pension Plan. Plaintiff, having supported MEBA actively in October-November, 1966, in reliance on this promise, continued thereafter to work as a marine engineer, changing from Cities Service to an employer which did have a collective bargaining agreement with MEBA. In 1971, after he had accumulated 25 years' service, plaintiff applied for his pension, believing that McKay and Brady had arranged for accreditation to him of 25 years' past service. In September 1971 plaintiff was told that he was ineligible for a pension. Approximately one year after plaintiff was denied his pension, he brought this action seeking both actual and punitive damages.*

This is a diversity action based on the fact that plaintiff is a citizen of Florida and defendants are citizens of New Jersey.

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* Because of subsequent events not related to this action, plaintiff has been determined eligible for a pension commencing as of January 1, 1976. Accordingly the actual damages sought have been reduced to $24,672.04 representing unpaid pension benefits for the period from 1971 through 1975. The claim for punitive damages has been deleted from the second amended complaint.

2. Course of Proceedings

The original complaint was filed on November 27, 1972. On May 16, 1973, the original complaint was dismissed by order of Judge Travia on the ground of lack of subject matter jurisdiction. On February 6, 1974, this court vacated the judgment of the District Court and remanded the action with leave to amend the complaint. On November 27, 1974, Judge Bruchhausen dismissed the amended complaint on the ground of lack of diversity jurisdiction. On reargument, leave to amend was granted, and the second amended complaint was filed on January 21, 1975. On August 11, 1975 Judge Bruchhausen entered an order permitting the action to proceed as a class action and dismissing all complaints against the defendants McKay and Brady individually. No appeal was taken from any part of this order.

3. Disposition of the Court Below

In the order appealed from herein, Judge Bruchhausen decided that all three claims were barred by the six-year statute of limitations, which the Court found commenced to run on November 16, 1966. The original complaint, filed on November 27, 1972, was eleven days late, according to Judge Bruchhausen's decision.

Statement Of Facts

Plaintiff alleges in his Second Amended Complaint as follows:

In May 1966, MEBA was engaged in an intensive effort

to organize the engineers employed by Cities Service and to persuade them to select MEBA as their bargaining representative. As of May 12, 1966, two elections had been held by the Cities Service engineers resulting in tie votes. (7a)*

On or before May 12, 1966, McKay and Brady, sought plaintiff's active support for MEBA's campaign to organize the Cities Service Engineers ("Campaign"). Plaintiff promised McKay and Brady that he would actively support MEBA if MEBA would assure him full pension rights upon retirement regardless of the outcome of the Campaign. In order to induce plaintiff to lend his active support to the Campaign McKay orally promised plaintiff that whether or not MEBA successfully organized Cities Service, MEBA would assure inclusion of plaintff in the MEBA Pension Plan with full benefits therein for plaintiff upon his retirement. (7a-8a)

On or about May 12, 1966, in order further to induce plaintiff to support the Campaign, McKay, on behalf of MEBA, wrote a letter to plaintiff aboard the S.S. "Council Grove" stating in part, that Cities Service was about to violate an agreement with MEBA not to negotiate with a competing union. In order to again enlist plaintiff's support for the Campaign and, in addition, for MEBA's efforts to discourage Cities Service from violating said agreement, McKay promised as follows in his capacity as President of MEBA:

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* Page numbers with the suffix "a" are in the Joint Appendix.

* * * * *

"Despite these occurrences [Cities Service's breaches of promise], however, District 2 makes the following additional commitment to all the Engineers employed by the Cities Service Tankers Corp.:

A) District 2 MEBA will satisfactorily conclude with the Trustees of the District 2 MEBA Pension Plan an arrangement permitting the Plan to pick up all the past service credits of any Engineer who supports District 2 MEBA in its current action against the violation of the election agreements--regardless of how this action comes out.

B) District 2 MEBA further guarantees that in the unlikely event that A) above is not accomplished by the Trustees' action, District 2 MEBA will make the appropriate contributions in behalf of said Engineers supporting District 2 MEBA in this action, with the result that the past service credits of the Engineers supporting District 2 MEBA will be totally accredited to their accounts for pensions from the District 2 MEBA Pension Plan." (8a)

* * * * *

On or about May 26, 1966, McKay and Brady wrote a letter on behalf of MEBA to all Cities Service Engineers including plaintiff, enclosing copies of the letter of May 12, 1966 (which previously had been sent not only to plaintiff, but to all engineers on the S.S. "Council Grove"), explaining that Cities Service had "reconsidered" its threatened violation of its agreement with MEBA. The letter added that further action against Cities Service nevertheless might be necessary, and specifically confirmed the promises previously made to plaintiff in the May 12 letter. In pertinent part, McKay and

Brady stated on behalf of MEBA in the letter of May 26 as follows:

* * * * *

> "Should the Company [Cities Service] refuse to agree to fair election conditions and permit the election to progress without prejudicial interference, we will then institute our original plan and take the necessary action to protect the engineers that have expressed their desire for District 2 MEBA representation.
>
> "We sincerely hope this regrettable action will not be necessary, but if it is, then the terms, commitments and conditions for the COUNCIL GROVE Engineers [as set forth in the letter of May 12] will apply to <u>all</u> Cities Service Engineers." (Author's emphasis)

* * * * *

In reliance upon the above-stated promises made by McKay and Brady on behalf of MEBA, plaintiff took over the direction of a picket line on behalf of MEBA at the S.S. "Bradford Island," a Cities Service vessel docked at Mobile, Alabama, during the period from October 26, 1966 to November 16, 1966, for the purpose of supporting MEBA in its Campaign. (9a)

Plaintiff's actions in support of MEBA were undertaken at the personal request of Brady and with the full knowledge and encouragement of McKay and Brady and other members of MEBA. (9a)

Plaintiff's actions in support of the Campaign were undertaken at considerable danger to his person and at great risk to his future employment by Cities Service. As a result of plaintiff's actions in support of the Campaign,

Cities Service advised him thereafter that the only job for him would be as a Second Assistant Engineer, whereas previously plaintiff had been employed by Cities Service as a First Assistant Engineer. By reason of this demotion, plaintiff was forced to quit his employment with Cities Service. (9a)

Upon plaintiff's retirement, he submitted an application to the MEBA Pension Plan for his pension. On September 1, 1971, Thomas E. Flintoft, Claims Coordinator of the MEBA Pension Plan, wrote to plaintiff rejecting the application and stated that plaintiff was not eligible for a pension. (10a)

The depositions taken in this action have demonstrated the following:

Neither McKay or Brady made any effort to fulfill the promises they made to plaintiff. (Doc. 44, p. 35; Doc. 45, p. 25)*

On September 22, 1967, plaintiff wrote a letter to Brady stating in pertinent part as follows:

> "I was over to the Council Grove in Baytown this summer and Cities Service has the rumor spread around that the union has refused to pick up my time with C.S. [i.e., Cities Service] for retirement and I told them [this] was all a big lie. I wonder if it would do any good to get my time checked by the Coast Guard and have the union certify my time for retirement and write down the amount I would receive after 23, 24 and 25 years service and have photostats made and sent to all C.S. Engs [Cities Service Engineers]. Well just some thoughts Jack take care of yourself." (78a-79a)

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* Numbers following the abbreviation "Doc." refer to the number assigned to the document in the Record on Appeal.

Brady did not reply to this letter. (Doc. No. 67, p. 59).

The Opinion Of The District Court

Judge Bruchhausen found that plaintiff had every right to enforce defendants' agreeme. as early as November 16, 1966 by the commencement of an action. Further, Judge Bruchhausen found that plaintiff had an obligation to seek a certification from the pension plan which would have informed the plaintiff of his credits, and then to sue for credits for past service if denied by virtue of the alleged promises of the defendant. For these reasons the Court held that the actions sounding in contract and promissory estoppel were time barred.* As to the fraud claim, the Court held that plaintiff could have discovered the fraud with reasonable diligence commencing November 16, 1966. This claim was likewise held to have been brought untimely. (28a, 29a)

ARGUMENT

Point I

The Statute of Limitations Did Not Commence to Run until Defendants Had a Reasonable Time to Perform Their Part of the Agreement. Performance Could Reasonably Have Been Made Any Time Prior to Plaintiff's Retirement and Application for a Pension, and in Any Event Well After Eleven Days from the End of Picketing in November, 1966.

The Court below reached the incorrect conclusion that plaintiff was entitled to bring an action immediately

* The applicable statute of limitations is six years, CPLR §213.

after the picketing ended in Mobile. This conclusion was incorrect because defendants had a reasonable time within which to perform their part of the agreement. The jury would be entitled to find that performance could reasonably have been made at any time prior to plaintiff's retirement and application for a pension, both of which events took place in 1971.

It is well established that in actions involving contracts to perform services or take actions other than the simple payment of money, where the time for performance is not specified, the statute of limitations does not begin to run until a reasonable time for performance has lapsed. In Brockhurst v. Ryan, 2 Misc. 2d 747, 146 N.Y.S.2d 386, 390-91 (S. Ct. N. Y. Cty. 1955) plaintiff brought a damage action for breach of contract by which defendants had promised to have plaintiff paint various portraits. Plaintiff had already painted some portraits and the agreement did not specify the time within which defendants were required to arrange for the completion of the series. The Court stated:

> "The parties appear to agree, and the court decides, that where, as in the case at bar, no date or time of performance is specified in the contract, the parties have a reasonable time to perform and the cause of action accrues and the statute begins to run as soon as such reasonable time has expired. . . . [citations omitted] It is, of course, clear that 'Reasonable time is not an inflexible term. It depends commonly upon the circumstances of each case.' [citations omitted]"

Noting that the action would have been time-barred if the cause of action accrued before June 24, 1948, the Court concluded (as the trier of fact sitting without a jury) that a reasonable time to perform had not expired by that date. Accordingly, the Court concluded that the action was timely brought, and did not attempt to fix the precise date in which the cause of action accrued. 146 N.Y.S.2d at 392. See also, City of New York v. New York Central R. Co., 275 N.Y. 287, 293 9 N.E.2d 931 (1937); and Pine v. Okonieski, 256 A.D. 519, 11 N.Y.S.2d 13. (4th Dept. 1939).

In the case at bar defendants had no obligation under their agreement with plaintiff other than to take the necessary steps to assure his past service accreditation prior to the disposition of his application for a pension. Because plaintiff was entitled to accumulate 25 years' service before retiring and applying for a pension, and in fact chose to do so, defendants were afforded the opportunity to perform their part of the agreement any time during the period from 1966 to 1971. Plaintiff had no ground for relief against defendants unless and until his application was denied in 1971.

In any event, even if the time for performance should be fixed at some time prior to 1971, it obviously could not have been on the last day of the picketing in 1966, or eleven days thereafter, First, the promises made by defendants required consultation with the Trustees and action by the

latter on a request for modification of the Plan. Only if that effort were unavailing were defendants required to arrange for the making of contributions directly by MEBA. These projects would have required months if not a year or more, even if undertaken on November 16, 1966. Second, the record does not disclose when it was established that the organizing effort was unsuccessful. It was only at such time that defendants' duty to perform under the contract would have been ascertained.*

Determination of the reasonable time for performance is a question of fact for the jury. King v. Edward B. Marks Music Corp., 45 N.Y.S.2d 630, 632 (S. Ct. New York Cty. 1943); Kestnbaum v. Lord, N.Y.L.J. February 27, 1976 (S. Ct. N. Y. Cty.). The District Court thus erred in dismissing the complaint.

Point II

Even If Defendants Are Found to Have Breached the Agreement in November, 1966, Such a Breach Was Anticipatory and Plaintiff Had the Option of Not Bringing His Action until Six Years After the Actual Breach Occurred in 1971

Judge Bruchhausen found that plaintiff was free to attempt to enforce defendants' promise immediately after the picketing ended. Thus is appears that the Court concluded that the contract was breached at that time, since no action

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* If Cities Service had been successfully organized by MEBA in 1966, or shortly thereafter, plaintiff's past service credits would in all likelihood have been assured automatically without any independent efforts by the defendants.

would lie unless a breach occurred. If any breach did occur on November 16, 1966, it was merely anticipatory, because defendants had a reasonable opportunity to perform their agreement through 1971. Consequently plaintiff was not required to bring an action until six years after September, 1971. In Ga Nun v. Palmer, 202 N.Y. 483 (1911) plaintiff brought an action against the estate of decedent to recover the sum of $20,000 which decedent had promised that plaintiff would receive upon decedent's death. Pursuant to this agreement, plaintiff took care of decedent at plaintiff's home until 1900, when decedent left. Decedent died in 1906 and the action was brought in 1907. The Court of Appeals held that the breach of the agreement by decedent in 1900 was anticipatory and held as follows:

> "Where the contract is wholly executory there must be some express and absolute refusal to perform, or some voluntary act on the part of the individual which renders it impossible for him to perform, in order to constitute an anticipatory breach for which an action will lie. Whereas by a partially executed contract the breach may result from a failure to perform some of the provisions of the contract. But in either case, after a breach by one party, the rights of the other party and his remedies are the same as to the unexecuted provisions of the contract. Howard v. Daly, 61 N.Y. 362."

The Court quoted with approval the opinion of Lord Campbell in Hochster v. De la Tour (2 Ellis & Blackburn, 678):

> "'The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for

> a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer.'" (Court's emphasis)

The court reversed the trial court's dismissal of the action and remanded the case for a new trial. See also Restatement, Law of Contracts, § 322 (Perm Ed. 1932).

Point III

Defendants Were Equitably Estopped from Asserting the Bar of the Statute of Limitations at any Time prior to Plaintiff's Discovery of the Breach of the Agreement in 1971

As is fully set forth above at p. 9 , on September 22,, 1967, plaintiff wrote to Brady expressly reaffirming his belief that defendants would be good to their word, and asking whether plaintiff and the other engineers similarly situated should request that the union certify their time for retirement. Brady's silence in the face of plaintiff's affirmative expression of confidence in his good faith had the effect of reinforcing plaintiff's confidence and lulling him into a continued belief that he would receive what he had been promised. As a result plaintiff did not seek any certification from the Union, nor did he bring a lawsuit. Under these circumstances defendants are equitably estopped from asserting that the statute of limitations commenced to run at any time before 1971, when plaintiff learned of defendants' failure to perform.

In Erbe v. Lincoln Rochester Trust Company, 13 A.D.2d 211, 214 N.Y.S.2d 849, 852 (4th Dept. 1961), the Court stated:

> "It is a familiar principle that when a defendant electing to set up the statute of limitations has previously, by deception or any violation of duty towards plaintiff, caused him to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which the court will not allow him to hold. 53 C.J.S. Limitations of Actions §25, pp. 963-964. * * *
>
> To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations. Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 232-233, 79 S. Ct. 760, 762, 3 L.Ed.2d 770. The principle has been implemented in decisions in this State." (citations omitted)

See also Ryan Ready Mixed Concrete Corp. v. Coons, 25 A.D.2d 530, 267 N.Y.S.2d 627, 630-31 (2nd Dept. 1966).

The doctrine of equitable estoppel is particularly appropriate in the case of union officers who hold positions of trust and have a fiduciary responsibility to the members of their union. See C.C. Lumber Co. v. Waterfront Comm. of New York, 31 N.Y.2d 350, 339 N.Y.S.2d 937, 942 (1972). When Brady was made aware by plaintiff's letter that plaintiff was relying on defendants' promise, he had an affirmative duty to dispel plaintiff's misimpression. His failure to do so was a blatant abuse of his position of trust and had the direct result of deceiving plaintiff as to the good faith of the defendants.

Point IV

There Was No Basis in Fact or Law for the Trial Court's Finding that Plaintiff Had an Obligation to Seek a Certification of His Pension Credits from the Pension Plan on November 16, 1966

The trial court reached the untenable conclusion that plaintiff had an obligation to seek a certification of his pension credits from the Pension Plan immediately after the picketing ended on November 16, 1966. (28a-29a). There is nothing in the record to support this finding, since the certification procedure was optional, and provided only a mechanism whereby members could ascertain their pension credits if they saw fit to do so at a particular time. (82a). Plaintiff saw no need to do so because he believed defendants' promise. His reliance was entirely understandable, in view of the fact that the promises were in writing and unequivocal.

Moreover, the Courts have held that an individual has the right to rely on the representations of his union official. In Lowe v. Feldman, 11 Misc.2d 8, 168 N.Y.S.2d 674 (S. Ct. N. Y. Cty. 1957), plaintiff sought a declaratory judgment that he was entitled to a pension, having worked as a union member for 25 years. The union contended that he was ineligible because he had been a part-time worker, and was not legally entitled to a pension since that was a matter of discretion for the union council. 168 N.Y.S.2d at 679. The Court held that plaintiff was entitled to a pension, and stated:

> "Those dealing with a union are justified in relying upon the word of its officers duly authorized and accredited under its by-laws and other rules of conduct." Id. at 681.
>
> * * *
>
> Having over twenty-five years, or to be more exact, having for twenty-nine years, accepted plaintiff's dues, in part turned over to the pension fund, as heretofore pointed out, and having permitted plaintiff to participate in the affairs of the union on a par with all the other members and to attain membership seniority, -- all in silence during this period of time, and with the full knowledge that he worked in the industry only for one day on either Saturday night or Sunday night and for the rest of the week in the post office, -- the union, I believe, is, in its present position of delinquency or indifference, estopped, as a matter of ethics, from repudiating its contract after plaintiff, by reason thereof, acted in good faith thereupon, and after he, as an outcome therefrom, acquired a claimed right. * * * In such situation, I am moved to remark that the union falls within the axiom that 'he who has been silent when in conscience he ought to have spoken, shall be debarred from speaking when conscience requires him to be silent.'" Id. at 685 (citations omitted)

Defendants, having made the unqualified promise to plaintiff that he would receive his full past service credits for a pension, cannot plausibly contend that plaintiff had an immediate obligation to seek from the Pension Plan a certification of the promised credits. Indeed, in view of the fact that defendants would have the opportunity to perform their promise at any time before plaintiff's retirement, a negative response from the Pension Plan in 1966 would not have been inconsistent with defendants' professed good faith.

Point V

Plaintiff Did Not Sustain Any Damage, and Hence Had No Cause of Action, until the Denial of His Application for a Pension in 1971

In cases factually similar to the case at bar, the Courts have held that no cause of action accrued until plaintiff is actually damaged as a result of defendants' failure to perform a required act. In Lewis v. Lewis, 59 Misc.2d 525, 299 N.Y.S.2d 755 (Civil Ct. N. Y. Cty. 1969), a husband and wife entered into a separation agreement in 1952 whereby the husband promised to keep a certain life insurance policy in force with his wife as beneficiary. In 1956 the policy was cancelled. The husband died in 1968. The wife thereafter brought an action against the husband's executor. The Court held that in such a case, where the breach and the harm to the plaintiff are not simultaneous, the cause of action assures when the harm occurs:

> "A claim for breach of contract threrefore arises, not upon the breach, but upon the occurrence of the harm engendered by the breach, for it is by the harm that the remedy is measured." 299 N.Y.S.2d at 757

In Ryan Ready Mixed Concrete Corp. v. Coons, supra, 267 N.Y.S.2d at 630, an action based in part upon the failure of defendant brokers to obtain insurance coverage for plaintiff as promised, the Court held:

> "Although many cases hold that in a contract action the Statute starts to run from the breach of the contract * * * , there are cases in which the breach and the accrual of the cause of action are not

> simultaneous. The Statute commences to run from the time when the plaintiff is first enabled to bring his action * * *. It is well established that allegations of a breach of contract are not sufficient to sustain a complaint in the absence of allegations of fact showing damage * * * . It follows that a breach of contract action against defendants would not lie prior to the insurer's disclaimer (at the earliest) because no damages could be shown."

Because plaintiff was not injured by defendants' failure to perform until 1971, the statute of limitations did not begin to run until then.

Point VI

Plaintiff Could Not Have Reasonably Discovered the Fraud until 1971

The trial Court found that plaintiff could have discovered the fraud (i.e., defendants' intention not to carry out their promise) with reasonable diligence commencing in November 16, 1966. This finding is completely without foundation. As has been developed above, the failure of defendants to take any action on their promise before 1971 was entirely consistent with a good faith intention to perform. There was no way plaintiff would have discovered the fraud before he was actually denied a pension in 1971.

In any event, even if plaintiff suspected the possibility of fraud, mere suspicion of fraudulent acts is no substitute for actual knowledge. Erbe v. Lincoln Rochester Trust Company, 3 N.Y.2d 324, 165 N.Y.S.2d 107, 111 (1957).

Since the issue of discovery of the fraud presents a mixed issue of law and fact and defendants have failed to

conclusively establish plaintiff's knowledge of the fraud prior to 1971, defendants' motion for summary judgment should be denied:

> "True, the plaintiffs will be held to have discovered the fraud when it is established that they were possessed of knowledge of facts from which it could be reasonably inferred, that is, inferred from facts which indicate the alleged fraud. Ordinarily such an inquiry presents a mixed question of law and fact (Higgins v. Crouse, 147 N.Y. 411, 415, 42 N.E. 6) and, where it does not conclusively appear that the plaintiffs had knowledge of facts of that nature a complaint should not be dismissed on motion (Dumbadze v. Lignante, 244 N.Y. 1, 9, 154 N.E. 645, 647)." 165 N.Y.S.2d at 111. (Emphasis added)

CONCLUSION

The judgment of the District Court dismissing the Second Amended Complaint should be vacated ar the action remanded for trial.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REGINALD V. SCHMIDT,

Plaintiff-Appellant,

vs.

RAYMOND T. McKAY and JOHN F. BRADY, representatives of a class of persons who were members of District 2 - Marine Engineers Beneficial Association - AFL-CIO in September 1971,

Defendants-Appellees

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ALAN DEMOVSKY, being duly sworn, deposes and says that he is employed by the law firm of Anderson Russell Kill & Olick, P.C., is over the age of eigtheen years and not a party to this action.

On the 22nd day of October, 1976, deponent served true copies of Brief of Plaintiff-Appellant together with Joint Appendix upon Levin & Weinhaus, Esqs., 515 Olive Street, St. Louis, Missouri 63101 and Smith & Kurlander, Esqs., 1255 Post Street, San Francisco, California 94109 and Markowitz & Glanstein, Esqs., 50 Broadway, New York, New York 10004 by depositing same in a sealed postpaid wrapper in the post office box regularly maintained by the U. S. Postal Service at 630 Fifth Avenue, New York, New York.

ALAN DEMOVSKY

Sworn to before me this
22nd day of October, 1976

NOTARY PUBLIC